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American Home Systems v. Cambria Homeowners Association : Reply Brief

Utah Court of Appeals

Cole Cannon; Cannon Law Group, PLLC; Attorney for Appellee.
Justin D. Heideman; Travis Larsen; Heideman, McKay, Heugly & Olsen, L.L.C; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

AMERICAN HOME SYSTEMS, LLC, dba WHY'RD, a Utah Corporation, Plaintiff, Counterclaim Defendant, and Appellant, v. CAMBRIA HOMEOWNERS ASSOCIATION, INC., a Utah non-profit Corporation, Defendant, Counterclaimant, and Appellee.	Case No. 20111085

APPEAL FROM ORDER OF CONFIRMATION OF ARBITRAL AWARD
THE HONORABLE JUDGE MCVEY
FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

REPLY BRIEF OF APPELLANT

COLE CANNON
CANNON LAW GROUP, PLLC
455 East 400 South, #400
Salt Lake City, Utah 84111
Attorney for Appellee
Cambria Homeowners Association, Inc.

JUSTIN D. HEIDEMAN (USB #8897)
TRAVIS LARSEN (USB #11697)
HEIDEMAN, MCKAY, HEUGLY & OLSEN, L.L.C.
2696 North University Avenue, Suite 180
Provo, Utah 84604
Telephone: (801) 812-1000
jheideman@hmho-law.com
tlarsen@hmho-law.com
Attorneys for Appellant
American Home Systems, LLC, dba Why'rd

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2696 North University Avenue, Suite 180
Provo, Utah 84604
Telephone: (801) 812-1000
jheideman@hmho-law.com
tlarsen@hmho-law.com
Attorneys for Appellant
American Home Systems, LLC, dba Why'rd

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I. CAMBRIA'S BRIEF DOES NOT COMPLY WITH RULE 24(a)(7) AND THE COURT SHOULD IGNORE ALL UNSUPPORTED FACTUAL OR EVIDENTIARY REFERENCES IN CAMBRIA'S BRIEF.

As an initial matter, the Court should note the numerous instances wherein Cambria recites a purported fact without any support from the record. Indeed, many of the "facts" cited by Cambria were not presented as evidence during arbitration. Pursuant to UTAH R. APP. P. 24(a)(7), "All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule." Subparagraph (e) of Rule 24 provides in relevant part, "References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g)."

The Statement of Facts section of Cambria's brief is a mere half page in length with only a handful of citations to the record. Cambria's failure to comply with the rule creates significant difficulty, where little would otherwise exist, regarding Why'rd's response to Cambria's briefing. Specifically, without citation to the record it is difficult to verify whether certain statements of "fact" were actually presented as evidence. Further, and more importantly, the paucity of record citation means this Court must either take Cambria at its word and accepts its factual assertions, or engage in its own exhaustive search of the record. An appellate court may properly refuse to "'consider any facts not property cited to, or supported by, the record.'" *Phillips v. Hatfield*, 904

P.2d 1108, 1109 (Utah App. 1995) (quoting *Koulis v. Standard Oil Co.*, 746 P.2d 1182, 1184 (Utah App. 1987) (internal quotation marks omitted)).

II. WHYRD FULFILLED THE AGREEMENT.

a. The Arbitrator misinterpreted language in the Agreement which specifically provides that minimum levels of throughput are <u>not</u> guaranteed.

Schedule 2 of the Agreement specifically provides that "[g]uarantee of minimum throughput levels are not available due to the constant fluctuation of utilization throughout the system." [R. 885:22-884:9]. The parties' clear intent by this provision was that Why'rd could not promise a particular level of throughput. The provision was included in the Agreement with the intent to protect Why'rd in the event that the basic internet service for which Cambria was paying became insufficient for its tenants' needs. [R. 885:22-102:9; R. 882:8-20]. As is apparent from the Arbitrator's findings, the Arbitrator's interpretation of the "no guarantee" provision was incongruent with the parties' intent and defied the plain language of the Agreement.

Cambria argues that this "no guarantee" provision cannot be construed so broadly as to nullify all other provisions of the Agreement, and Why'rd whole heartedly agrees with this proposition. However, Why'rd's interpretation of the "no guarantee" language does not require this Court to ignore any of the other provisions in the Agreement. Specifically, Cambria points to language in the Agreement that "Bulk Programming will include the ability for each tenant to have access to 3mbps of download throughput ...." Why'rd does not intend to read this language out of the Agreement. However, Cambria's own conduct prevented its residents from accessing 3 mbps throughput.

Cambria wants the Court to believe it is innocent of any contribution to the problems with Why'rd's service. To the contrary, it is undisputed that Cambria tenants engaged in commercial use of the internet. Cambria residents hosted web sites. [R. 976:22]. Why'rd observed at least half a dozen Cambria residents working from home as web site developers. [R. 975:12-14]. Cambria residents engaged in a commercial range of throughput. [R. 973:11-12]. Cambria residents hosted at least two commercial web sites, one of which was a commercial pornographic website. [R. 972:9-14]. Cambria's own expert witness, Spencer Wangsgard, acknowledged that hosting a pornographic site is a commercial use. [R. 1539:8-12].

Ted Burnett testified that utilization of the internet at Cambria was at least 70 or 80 percent higher than other similar developments he had monitored and that he had never seen a larger assembly of more internet hungry people ever. [R. 970:5-12]. Further, Ted Burnett stated that there was more bandwidth utilized in that particular project than in the other half dozen projects he was monitoring at the time. [R. 970:13-16]. Why'rd observed one tenant download over 1 gigabyte per hour for twelve hours. [R. 968:15-18]. Why'rd observed that another Cambria resident left for the weekend and downloaded all nine seasons of Stargate. [R. 964:15-18]. Cambria resident, Montane Hamilton, was using his internet as a programmer to monitor certain websites he was running. [R. 1509:3-10]

During the initial years of the contract, when there were not as many Cambria tenants, the amount of bandwidth contracted for was sufficient for demand. [R. 880:3-9]. However, as user-related problems began occurring with the internet, Cambria was unwilling to pay for increased bandwidth, and at no point did Cambria purchase more

bandwidth than that which was originally negotiated for in the 2005 contract. [R. 836:14-17]. Why'rd offered to double Cambria's bandwidth for $2 per month; Cambria did not accept. [R. 890:13-17; see also R. 758:2-5]. Cambria informed Why'rd that it would not, under any circumstances, raise HOA fees. [R. 758:18-21].

Cambria also refused to purchase a Quality of Service, or QOS, system to regulate internet use, believing that Why'rd was obligated to pay for the QOS. [R. 1592:19-25]. However, a plain reading of the Agreement clearly shows that there was no requirement for Why'rd to provide QOS or bandwidth throttling tools. [R. 1560:16-21].

The "no guarantee" provision in the Agreement rather obviously does not mean that Why'rd is obligated to provide a minimum threshold of 2.7 mbps throughput – there is no evidentiary support for that proposition. Furthermore, the Arbitrator never made a finding that the Agreement is ambiguous and any extrinsic evidence that may have been considered by the Arbitrator is inadmissible. The Court is, therefore, left with the task of deciphering what the "no guarantee" provisions means. As Cambria correctly argues, this provision cannot be used to obviate the other provisions of the Agreement. By the same token, other provisions of the Agreement cannot be read to obviate the "no guarantee" provision.

The key to interpreting the Agreement's provisions harmoniously is found within the document itself. The Agreement provides that "[g]uarantee of minimum throughput levels are not available due to the constant fluctuation of utilization throughout the system." [Emphasis added]. In other words, Cambria bears the risk that throughput may fall below 3 mbps based on its own utilization of the internet. As discussed above and in Why'rd's opening brief, Cambria residents over-used the basic level of internet service bargained

for, and used the internet in violation of the Agreement. Where Why'rd has, in good faith, attempted to provide 3 mbps throughput to Cambria, Cambria bears the risk that internet throughput may fall below that particular level. This is especially true where Cambria residents were receiving satisfactory internet early in the relationship when demand was lower. [See R. 880:3-9].

b. Why'rd Maintained Functional Internet Service for No Less than 20% of 120 Consecutive Days.

The Agreement, at Schedule 2, clearly states that Why'rd was required to "maintain functional service for no less than 20% of a 120 consecutive day period." Cambria makes five arguments as to the inapplicability of this provision:

First, Cambria argues that a rational person would not agree to purchase a product that only worked one out of every five days. This argument is not particularly helpful to the Court insofar as (a) Cambria did in fact agree to the 20% provision, and (b) whether a rational person would agree to this provision is not legally relevant.

Second, Cambria argues that Section 3.7 of the Agreement, requiring Why'rd to reevaluate its services every two years to ensure that they are competitive, somehow renders the 20% provision immaterial. As discussed above, the Court must give some meaning to the 20% provision and cannot write that provision out of the Agreement.

Third, Cambria argues that Why'rd failed to provide functional service for even one day. This argument is not supported by the record and Cambria does not attempt to cite any evidence for its claim. The Arbitrator did not make any finding as to the number

of days Why'rd provided functional internet service. It would be plain error for the Court to base its decision on this argument.

Fourth, Cambria argues that it is not commercially reasonable for Why'rd to only provide functional service 20% of the time. Again, Cambria fails to point to anything in the record to assist the Court with an understanding of commercial reasonableness. Cambria instead asks the Court to adopt its logic without regard to the language of the Agreement. Furthermore, Cambria agreed to the 20% provision, and commercial reasonableness is irrelevant.

Fifth, Cambria points to the Arbitrator's findings that the internet was "frequently out", that "Other tenants found the internet to be unusable for normal residential internet use", and that "Long periods of disruption were experienced by tenants" as dispositive that the internet was not functional for at least 20% of a 120 day period. These are not dispositive findings. The Arbitrator did not make findings about the number of days the internet was "out" or how many days constitute "long periods of disruption" or the extent to which certain tenants found the internet unusable.

The major flaw in Cambria's argument about the 20% provision is that Cambria offers no alternate meaning of this provision. Clearly the provision must mean something. Instead of proposing an interpretation of the 20% provision, Cambria merely asks the Court to ignore the provision and render it meaningless. As discussed above, the Court must not render the 20% provision meaningless. The plain meaning of the provision is that, as long as the internet is functional for no less than 24 days out of 120,

Why'rd has fulfilled its commitment. The Arbitrator made no findings on this point and, if necessary, the Court should remand this matter to the District Court for findings.

Cambria claims that the Agreement requires Why'rd to provide 24 consecutive days of functional service out of 120 days. Cambria's argument is inconsistent with the language of the Agreement providing that Why'rd "maintain functional service for no less than 20% of a 120 consecutive day period." The Agreement says nothing about the functional days being consecutive. Cambria did not bargain for 24 consecutive days of functional internet service – it bargained for 24 days out of a 120 consecutive day period.

c. The Arbitrator misinterpreted Why'rd's obligations under the Agreement to monitor, control, and keep in good working order, the "System."

Cambria mistakenly assumes that if the internet System is working correctly, its tenants should have access to 3 mbps throughput. Cambria fails to recognize that the reason its residents were experiencing slow internet was because of the demand on the available throughput and had nothing to do with the "System", as that term is defined in the Agreement. The Arbitrator wrongly construed the Agreement to mean that because the internet was slow, Why'rd must have failed in its obligation to keep the System in good repair.

Cambria misconstrues Why'rd's argument to mean that Why'rd's only obligation with respect to performance of the internet had to do with maintaining the equipment. Clearly, Why'rd was also obligated to meet certain customer service obligations. Importantly, the Arbitrator found that Why'rd's level of customer service did not constitute a breach of the Agreement. [Arbitral Award, p. 7].

The Arbitral Award is necessarily predicated on an incorrect reading of the term "System" in the Agreement. System in not synonymous with service, as Cambria seems to indicate. If "System" were synonymous with service, Why'rd could not have fulfilled its customer service obligations while simultaneously breaching its obligations to keep the "System" in working order.

d. Why'rd performed its obligation to provide cable television.

In Section 3.1 of the Agreement, Why'rd disclaimed responsibility for blank, missing, and changing channels. Section 3.1 of the Agreement provides, in relevant part:

> Subscriber acknowledges that the owners/distributors of Bulk Programming, rather than [Why'rd], determine the content of the Bulk Programming, and as a result [Why'rd] shall have no responsibility of liability for Bulk Programming content. As between [Why'rd] and subscriber, or [Why'rd] and any Tenant, [Why'rd] has the sole right to edit, select, schedule and determine the [Why'rd] Programming services contained in the [Why'rd] programming packages .... [Why'rd] may add, delete, or modify the Bulk Programming, which may be caused, among other things, by satellite programming industry changes, deletions, additions, or the termination, modification or replacement of [Why'rd] programming agreements.

Cambria insists that the term "content" in Section 3.1 is limited to the actual programs and shows provided by the Bulk Programming distributor. Review of the language of the Agreement reveals that the purpose of Section 3.1 is to relieve Why'rd of responsibility for conduct of the Bulk Programming distributor over which Why'rd has no control. The narrow interpretation of the term "content" espoused by Cambria would not take into account additional aspects of the Bulk Programming over which Why'rd has no control.

Cambria argues that Why'rd does in fact have the ability and power to make changes to the programming. Although Why'rd may make changes as to the selection of channels delivered to Cambria, Why'rd does not have the ability or power to make any other changes to the programming. Why'rd has no control over whether a channel is blank or fuzzy when delivered by the Bulk Programming distributor. Likewise, Why'rd has no control over whether a particular channel, like ESPN, is missing or assigned to a different channel number. The uncontroverted testimony of Why'rd's expert, David Springer, is that it is normal for a cable distributor to rotate the number channel on which it broadcasts its programming. [R. 1520:23-1519:8]. Thus, such complications and issues with cable television are managed and controlled by the Bulk Programming distributor and, therefore, are simply out of Why'rd's control.

All that the Agreement requires is that Why'rd provide cable television. Whether the cable television had poor quality or not, Why'rd provided to Cambria the channels set forth in Schedule 1 of the Agreement. Why'rd did what it was contracted to do and Cambria got the channels it bargained for. If the cable television quality fell below a certain standard, the Agreement contains provisions for Cambria to address problems with Why'rd, and Cambria should have availed itself of the mechanisms set forth in Section 3.6 of the Agreement. Importantly, the Arbitrator concluded that "The customer service provided was marginal and problematic, but the Arbitrator does not specifically find that the low level of customer service constituted a material breach." [Arbitral Award, Conclusions, ¶ 6]. Thus, Why'rd fulfilled its obligations under Section 3.6. [See Arbitral Award, Conclusions, ¶ 6]. Where the Arbitrator found that Why'rd did not

breach its obligations to provide customer service, the Arbitral Award should not conclude that "poor television service" constitutes a breach, particularly when the "poor television service" complained of was specifically disclaimed by Why'rd. Therefore, the Court should correct the Arbitrator's finding of breach as related to the cable television service.

Cambria attempts to re-write the Agreement to include new provisions requiring Why'rd to make cable upgrades available to Cambria residents. Cambria claims that Why'rd breached the Agreement by failing to provide residents the ability to upgrade their cable packages. While the Arbitrator, in his findings of fact, did point to the residents' inability to upgrade to HD in the Arbitral Award, the Arbitrator did not find that this constituted a breach of the Agreement.

Even assuming, arguendo, that blank, fuzzy, missing, and changing channels constitute a breach of the Agreement, the fact that Cambria experienced blank, fuzzy, missing, and changing channels is not a breach that defeats the purpose of the Agreement. Therefore, even if Why'rd failed in some particulars to provide quality cable television service, these breaches do not justify early termination of the Agreement.

III. CAMBRIA BREACHED THE AGREEMENT WHEN ITS RESIDENTS ENGAGED IN "HIGH VOLUME" AND "COMMERICAL" INTERNET USE, THUS EXCUSING WHY'RD'S FURTHER PERFORMANCE OF THE AGREEMENT.

The Agreement, at Schedule 2, provides, "This system is not designed for the support of high volume or commercial grade servers. The system is designed as a 'residential system,' meaning that high level of volume that indicates server related

activity will be monitored and controlled to preserve the integrity of the system for all of its users." On appeal, Cambria argues that user-related activity is not the same as server-related activity and, therefore, Why'rd's interpretation of the Agreement is flawed. Cambria goes through great lengths to describe alleged differences between high volume "use" and high volume "servers." Cambria's arguments, however, are unsupported by references to the record. Cambria expects the Court to accept at face value Cambria's unsupported assertions regarding the highly technical field of internet service.

Cambria overlooks the fact that its own witness, Jason Sucher, used the terms "use" and "servers" interchangeably while testifying during the arbitration proceedings. Mr. Sucher testified that Cambria understood that certain types of uses of the system were not supported by the residential system that Why'rd was building. When asked about Cambria's understanding of Schedule 2 of the Agreement, Mr. Sucher testified, "I would say that our understanding of that was that people shouldn't be operating a server like streaming content which would require a great amount of bandwidth...." [R. 1300:1-4]. Thus, streaming content on the Internet was akin to operating a server and constituted the type of use of the system that residents should not engage in. Additionally, Mr. Sucher testified that Cambria understood that residents were not supposed to operate home businesses using the residential system, (R. 1301:12-15), and equated running a home business to running a server (R. 1299:11-12).

Spencer Wansgard, an expert witness for Cambria, also used the term "users" when testifying about Schedule 2. When asked what it meant to "monitor and control a system," as it related to the provision of Schedule 2 that "high level of volume that

indicates server related activity will be monitored and controlled to preserve the integrity of the system for all of its users," Mr. Wansgard testified that it meant to "manage heavy bandwidth *users*." (emphasis added) [R. 1131:24-1130:3].

The record also reflects that David Springer, an expert witness for Why'rd, testified that the above-referenced provision of Schedule 2 meant that the system was not designed to support high volume use. [R. 735:6-18]. Thus, Mr. Springer's expert testimony does not embrace the same narrow-interpretation of the term "server" that Cambria now asserts.

It seems clear from the evidence presented at arbitration that the distinction between high volume "use" and high volume "servers" that Cambria now attempts to engender is not a distinction that was used during the arbitration proceedings. In fact, such a distinction was not alleged or pursued by Cambria at any time during the Arbitration proceeding.

As witnesses testified during Arbitration, a handful of commercial-grade users can hog the available bandwidth, slowing down internet speeds for the whole Cambria community. Ted Burnett testified at Arbitration that he observed a single resident continuously using 51% of the total bandwidth available to the entire Cambria community to download nine seasons of "Stargate." [R. 968:15-964:18]. Mr. Burnett also testified that there were about half a dozen residents who were using a lot of bandwidth as web developers. [R. 956:1-2]. As is evident from email correspondence between the parties, Cambria understood that these "bandwidth hogs," as they were called, caused the internet to service to slow down. [R. 934:9-15].

Additionally, the record shows that Cambria residents were actually hosting servers on the residential system. According to the testimony of Ted Burnett, he observed a Cambria resident hosting servers in his individual unit to host a commercial pornographic Web site. [R. 956:17-955:4].

The evidence presented at Arbitration establishes that the parties understood the terms "use" and "server related activity" synonymously. Cambria residents engaged in "high volume" or "commercial" use of the residential system built by Why'rd. Thus, the Arbitrator clearly erred when he failed to find that Cambria residents engaged in "high volume" or "commercial" internet use.

IV. CAMBRIA INTERFERRED WITH WHY'RD'S PERFORMANCE OF ITS OBLIGATIONS AS THEY RELATE TO PROVIDING QUALITY INTERNET SERVICE.

Cambria argues that it bargained for basic services and not broken services. Why'rd agrees with this statement. However, the Arbitrator did not find that Why'rd never provided basic services. As of December 2006, Why'rd was providing seven T1 lines, or 10.5 mbps throughput, to the head-end unit at Cambria. [R. 961:16-960:10]. Ten-and-a-half mbps throughput exceeded what Why'rd was obligated to provide under the Agreement. [R. 846:5-11]. The Arbitrator made no finding that services were subpar at the beginning of the relationship. In fact, and this is a critical point, Why'rd successfully provided its services at the beginning of the relationship. During the initial years of the contract, when there were not as many Cambria tenants, the limited bandwidth was sufficient for demand. [R. 880:3-9].

Why'rd fully acknowledges that the services eventually became unsatisfactory, but the Court must examine the reasons for the breakdown in service. By way of its appeal, Why'rd argues that the services failed for the following reasons:

a. Cambria did not permit Why'rd to disconnect abusers of the Internet system.

b. Cambria refused a QOS system.

c. Cambria refused to purchase more bandwidth.

Cambria's actions prevented Why'rd's efforts to carry out its obligation to monitor, control, and keep the system in good working order. Had Cambria allowed Why'rd to temporarily disconnect abusers of the internet system, or had Cambria agreed to a QOS, Why'rd would have been able to effectively control the system and keep it in good working order. Similarly, if Cambria had accepted Why'rd's offer and agreed to pay $2 more per month per tenant, Why'rd could have doubled Cambria's bandwidth, which would have vastly improved the internet quality.

Cambria does not dispute that it instructed Why'rd that it could not shut off heavy internet users. Why'rd was able to determine when a resident was abusing the system by monitoring the system and studying trends and use graphs. [R. 965:12-19]. By doing so, Why'rd could pinpoint high volume throughput to individual units. [R. 965:12-19]. On one particular occasion, Ted Burnett observed that one unit was using up more than half of the bandwidth available to the entire Cambria community. [R. 965:12-964:18]. Mr. Burnett tried to contact the resident for several hours and left numerous messages for the resident. [R. 965:12-964:18]. Mr. Burnett turned off the resident's Internet access only after Mr. Burnett's attempts to contact the resident, over the course of several hours, were

unsuccessful. [R. 965:12-964:18]. The resident returned Mr. Burnett's messages several days later and inquired about why his Internet was not working. [R. 965:12-964:18]. However, this resident's service was restored after Why'rd was able to have a discussion with the resident regarding his heavy use of the bandwidth. [R. 963:8-14].

Thus, Why'rd only temporarily turned off an abuser's internet access until Why'rd could speak with the abuser to discuss the problem. Additionally, the record shows that a resident's service was turned off only after a thorough investigation of the problem and if Why'rd was not able to speak with the resident about their usage. The record also reflects that even after Why'rd knew which unit was hogging the bandwidth, Why'rd did not immediately resort to turning off access but waited several hours as Why'rd tried to contact the abusing resident. Why'rd, therefore, was not permanently denying residents access to the internet, but rather was controlling the system against abusers after completing a thorough investigation of the abuse and attempting to speak with the abusing resident. Cambria later instructed Why'rd that it could not shut off heavy internet users, thereby interfering with Why'rd's method of controlling abuse on the system. [R. 963:15-962:18].

Additionally, the bandwidth problem shifted from dealing with a handful of bandwidth hogs to everyone demanding more bandwidth. [R. 869:9-11]. The only way that Why'rd could have resolved the issue of residents wanting more bandwidth was to actually provide more bandwidth than what Why'rd was already providing. [R. 869:9-11]. Cambria, however, refused to pay for additional bandwidth, and Cambria simply

was not paying for enough bandwidth for everyone to have the Internet speed that they assumed they could get. [R. 1437:15-17; 1357:4-10].

Finally, Cambria does not dispute that it refused the QOS. Cambria's stated reason for the refusal was that it felt that Why'rd was obligated to purchase the QOS. Cambria argues that Why'rd was obligated to purchase the QOS because Why'rd had a duty to monitor and control the system. However, when purchasing a basic T1 line, the purchaser receives only a basic level of control and management and not the QOS that is part of a higher-quality package. [R. 833:17-22]. Cambria's argument that Why'rd was responsible for the cost of the QOS fails to take into account the fact that Cambria purposefully contracted for very basic Internet service. Cambria was not interested in investing in high quality Internet service but only want to ensure that the backbone was in place. [R. 895:10-23]. Why'rd indicated that it could install a T1 line that would give all of the residents access to the internet and there would be very minimal management of such a basic service. [R. 895:10-23]. It was clear at the outset that Why'rd would not be providing extensive monitoring or control of the system. [R. 895:10-23]. Cambria's insistence that Why'rd cover the cost of the QOS, an expense not accounted for in the Agreement, would permit Cambria to demand additional services than those for which it originally contracted. Such conduct would, in turn, diminish the value and expected benefit for which Why'rd contracted.

Because Cambria refused solutions to the internet problems, Why'rd, under the circumstances, satisfactorily performed its obligations under the Agreement. Any failure by Why'rd to perform its obligations was a direct result of Cambria not allowing Why'rd

to shut off bandwidth hogs, its refusal to purchase additional bandwidth, and its refusal to purchase a QOS. The Arbitrator found that "Why'rd failed to keep the system competitive within industry standards." [Arbitral Award, Findings of Fact, ¶ 24]. Based on this, the Arbitrator concluded that "the price and quality of the services offered by Why'rd were not comparable to those offered to the general public and this constituted a material breach." [Arbitral Award, Conclusions, ¶ 3(f)]. Where Cambria prevented Why'rd's efforts to ensure the quality of the service it was providing, this Court should rule that Why'rd's performance of the Agreement is excused.

V. CAMBRIA HAS BEEN UNJUSTLY ENRICHED.

Despite the existence of the Agreement, Why'rd is entitled to unjust enrichment damages. Cambria argues that the Agreement makes provision for premature termination – this is true. However, the provision identified by Cambria in Schedule 2 has nothing to do with what would happen to the physical infrastructure, or the value thereof, in the event of premature termination. The parties did not contemplate the treatment of the infrastructure upon premature termination of the Agreement, and equity must fill in the void.

Cambria argues that Why'rd bore the risk that it would lose the value of the infrastructure if it failed to perform under the Agreement. Cambria then opines on communication industry standards without any support from the record. What Cambria fails to recognize is that Why'rd is not attempting to recover, in unjust enrichment, the entire value of the infrastructure, but only the pro-rated value of the infrastructure for the 77 months Cambria failed to make payments under the Agreement. Those 77 months represent payments that Cambria never made for the infrastructure it received.

Cambria disagrees with Why'rd's reliance on *Bailey-Allen Co. Inc. v. Kurzet*, 876 P.2d 421 (Utah App. 1994) and *Lowe v. Rosenlof*, 364 P.2d 418 (Utah 1961). The *Bailey-Allen* Court cited *Corbin on Contracts* §§ 700 & 710 to establish the rule that

> [i]f the defective performance, though less than 'substantial' has conferred benefits on the defendant in excess of his [or her] injury, he [or she] may be under a quasi-contractual duty to pay that excess. *Id.* § 700, at 310. Thus, [a] contractor whose breach is such that he [or she] has rendered less than "substantial performance" has no right to the contract price; he [or she] is said to have no remedy "on the contract".... The contractor's right is a right to reasonable compensation for value received by the defendant over and above the injury suffered by the contractor's breach. Id. § 710.

Bailey-Allen Co., Inc., 876 P.2d at 425 (quotations omitted)(emphasis added).

Cambria argues that Why'rd was paid for the time period before which Cambria terminated the Agreement, and that such payments compensated Why'rd for the value of the work it provided. This analysis is inadequate in light of the enormity of the upfront cost of the Cambria infrastructure - $834,570.88. The only way Why'rd could recover the cost of its infrastructure was to receive payments over the life of the Agreement. Cambria failed to compensate Why'rd for 65.8 percent of the infrastructure it received. The amounts paid by Cambria to Why'rd are simply deficient to compensate Why'rd for the substantial investment it made into the Cambria project. Why'rd is entitled to "reasonable compensation for value received" by Cambria.

To the extent the Court agrees with Cambria that the value of the infrastructure was inadequately established at Arbitration, the Court should remand this matter to the District Court with instructions to enter an award for the pro-rated value of the infrastructure or "reasonable compensation for value received" by Cambria. Furthermore, the Court may

need to remand this matter for the District Court to sort through the issues Cambria raises, which, again, are outside the scope of the record, concerning what pieces of infrastructure remain at the property and the proper ownership of certain components of the infrastructure.

VI. THE ARBITRATOR ERRED IN FINDING THAT WHY'RD DID NOT PROVIDE "SYSTEM CAPACITY OF 10 MBPS THROUGHPUT."

Cambria accuses Why'rd of trying to deceive this Court. To begin with, this accusation is untrue. This issue actually seemed rather simple to Why'rd, and Why'rd is quite shocked at the visceral reaction from Cambria. Why'rd's arguments to the Court on this point, and all other points of its brief, were entirely genuine.

For its part, Why'rd equates "system capacity" with the available bandwidth at the headend unit. Because 10 mbps came into the headend, 10 mbps is the capacity of the system. There is ample and abundant support for this proposition in the record: David Springer testified that his guaranteed testimony was that the system capacity was well beyond 10 mbps. [R. 1528:4-7]. Robert Schmoyer testified that Why'rd provided system capacity from the headend to the customer of at least 10 mbps. [R. 669:6-18]. Cambria's attorney stepped through a hypothetical with Mr. Schmoyer in which a pipe represented system capacity, and Mr. Schmoyer identified the capacity as 10 mbps. [R. 648:13-22]. In fact, the Cambria system capacity ultimately reached 50 mbps, greatly exceeding 10 mbps. [R. 886:13-885:11].

Cambria's argument equates the term "system capacity" with individual tenant throughput access. Cambria fails to identify anything in the record to support its argument. Cambria relies heavily on the notion that this issue was somehow resolved on a Motion in

Limine heard by the Arbitrator on December 7, 2010, but it was not. By its Motion in Limine Why'rd asked the Arbitrator to construe the Agreement to mean that its obligations flowed to Cambria and not to the Cambria residents. The discussion on the Motion in Limine about system capacity did not deal with Why'rd's performance as much as it dealt with the identity of the obligee of Why'rd's promises.

The Arbitrator's Decision on the Motion in Limine certainly does not support Cambria's position. The only reference by the Arbitrator to system capacity is a mere recitation of the Agreement's provision obligating Why'rd to provide system capacity within the project of 10 mbps to each tenant. [Arbitral Award, Exhibit A, p. 3]. The Arbitrator's Decision made no finding, in any sense, that Why'rd had failed to meet this obligation.

The Arbitrator found that Why'rd breached the Agreement by its "Failure to provide each tenant with access to 3 mbps of download throughput upon completion of the project." [Arbitral Award]. Cambria urges the Court to adopt a completely redundant finding that Why'rd also breached by failing to provide each tenant with access to 10 mbps. Cambria's reading of the Arbitral Award overlaps these two conclusions.

The Arbitral Award provides no factual findings or other basis for the determination that Why'rd breached the Agreement by failing to provide a system capacity of 10 mbps. The conclusion of breach is a complete oddity without evidentiary support.

The finding of breach on this point is clearly erroneous inasmuch as Cambria cannot point to any evidence it presented, or any fact the Arbitrator could have relied on, to support such a finding. Cambria does not point to a single fact upon which this finding of breach

could have been based. Furthermore, under a correctness standard, the Arbitrator misconstrued the stipulation of the parties. System capacity is equivalent to the available bandwidth at the headend unit, and is not, as Cambria now claims, the same thing as tenant access.

CONCLUSION

For the reasons set forth above, Why'rd respectfully requests the Court to reverse the Arbitral Award and remand this matter for entry of judgment in favor of Appellant.

DATED and SIGNED this 18th day of May, 2012.

HEIDEMAN, MCKAY, HEUGLY & OLSEN, L.L.C.

JUSTIN D. HEIDEMAN
TRAVIS LARSEN

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I hereby certify, pursuant to Utah Rules of Appellate Procedure 24(f)(1)(C), that the Appellant's reply brief complies with the type-volume limitation set forth in Utah Rules of Appellate Procedure 24(f)(1)(A). Appellant's brief contains 5,587 words.

DATED and SIGNED this 18th of May, 2012.

HEIDEMAN, MCKAY, HEUGLY & OLSEN, L.L.C.

TRAVIS LARSEN

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 2012, I caused to be served upon the below-named party two true and correct copies of the Reply Brief of Appellant, via US mail, postage prepaid.

Cole Cannon
CANNON LAW GROUP, PLLC
455 East 400 South, #400
Salt Lake City, Utah 84111
Attorney for Appellee
Cambria Homeowners Association, Inc.

HEIDEMAN, MCKAY, HEUGLY & OLSEN, L.L.C.

TRAVIS LARSEN